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The Common European Sales Law's Compliance with the Subsidiarity Principle of the European Union

Michael Educate*

Abstract

The European Union is considering a proposal to create a uniform sales law that would apply to cross-border sales agreements: the Common European Sales Law (CESL). If adopted, the CESL would be an optional instrument: traders could write their contracts with other traders and consumers to make the CESL govern their sales contracts. This Comment addresses whether the CESL complies with the EU's subsidiarity principle, which prohibits the EU from passing any regulations that address matters that can be sufficiently addressed by lower government authorities. One of the EU's primary objectives is completing the internal market among the member states, which the CESL would allegedly encourage by reducing traders' legal costs in cross-border trade. Ultimately, however, the CESL violates the subsidiarity principle precisely because of its optional nature. Traders seeking to engage in cross-border trade will not willingly choose to operate under a legal regime with no preexisting case law, no guarantees of consistent rulings by member states' judiciaries, provisions that prevent the CESL's broader application outside of sales contracts, and particularly high consumer protections.

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Table of Contents

I. Introduction	318
II. A Political and Economic Framework for the Subsidiarity Principle.....	321
A. Efficiency Analysis of the Subsidiarity Principle	321
B. Decentralization as a Response to the Underlying Democratic Deficit in the EU.....	323
C. Subsidiarity Case Law: Skirting the Centralization Debate	327
III. CESL Provisions That Complicate the Development of European Contract Law.....	328
IV. Legal Arguments for and against the Common European Sales Law's Compliance with the Subsidiarity Principle	333
A. The Commission's Legal Support.....	333
B. Member States in Support	337
C. Member States in Opposition.....	339
V. Solution: An Optional Instrument Violates the Subsidiarity Principle.....	342
VI. Conclusion.....	344

I. INTRODUCTION

In November 2011, the European Commission (the Commission) formally proposed the Common European Sales Law (CESL).¹ The product of a comparative study of contract law within the EU,² the CESL is an attempt to consolidate further the EU internal market by reducing transaction costs for traders and consumers engaged in cross-border transactions. The CESL emphasizes both uniform background contract rules and stronger consumer protections to incentivize both traders and consumers to participate in the regime. Similar to the Uniform Commercial Code (UCC) in the United States,³ the CESL's provisions draw on the merchant practices and contract law of the member states, thereby theoretically streamlining legal issues that traders face when conducting business in multiple jurisdictions.

¹ *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (CESL). This document includes an "Explanatory Memorandum" along with the text of the proposed CESL. In this Comment, references to the memorandum are cited with the page number, and provisions of the CESL itself are cited with the relevant article.

² See Christian von Bar, et al, eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier 2009). The Draft Common Frame of Reference was the primary source that the Commission used to craft the CESL's default rules.

³ See Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan L R 621, 624 (1975) (describing the foundational sources of law formalized in the UCC).

There is one key difference, however, between the UCC and the CESL. While the UCC replaces and supplements the law in states that have selectively adopted its provisions, the CESL does not. Instead, the CESL would stand alongside member states' sales laws as a second national law. And unlike the overwhelming majority of the EU's legislative actions, which are instituted via mandatory directive, the CESL would be an optional instrument⁴ that traders "can use or ignore as they choose when they enter into cross-border transactions"⁵ with consumers or other traders in foreign member states.⁶ The CESL's premise is that all traders engaging in cross-border sales within the EU would only have to learn one "foreign" sales law, as opposed to twenty-six. However, even when all the parties to a transaction are traders,⁷ the CESL could only be used when at least one party is a small- or medium-sized enterprise (SME).⁸

The European Parliament and the Council of the EU have yet to adopt the CESL, and member states continue to debate its merits.⁹ Implementation is particularly contentious in light of the EU's subsidiarity principle. The subsidiarity principle prevents action at the EU level when local government legislation would suffice. It commits the member states and the EU to decide on a case-by-case basis whether centralized regulations better promote economic prosperity and convergence among the member states' economies than do decentralized regulations. To comply with this principle, the CESL must be evaluated based on the EU's express goals of "achiev[ing] the strengthening and

⁴ CESL, Art 3 (cited in note 1) ("The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods.").

⁵ Eric Posner, *The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition* *2 (University of Chicago Institute for Law and Economics Olin Research Paper No 597, May 2012), online at <http://ssrn.com/abstract=2049594> (visited Apr 14, 2013).

⁶ As articulated in the Commission's explanatory memorandum attached to the CESL proposal:

The overall objective . . . is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a selfstanding uniform set of contract law rules including provisions to protect consumers.

CESL at 4 (cited in note 1).

⁷ Article 2 defines a trader as "any natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession." Id at Art 2.

⁸ Id at Art 7.

⁹ For a brief overview of the CESL's primary effects, see *An Optional Common European Sales Law: Frequently Asked Questions*, MEMO/11/680 (2011), online at http://ec.europa.eu/justice/contract/files/common_sales_law/m11_680_en.pdf (visited Apr 14, 2013). See Sections IV.B and C for further discussion of the member states' arguments for and against the CESL.

the convergence of [the member states'] economies"¹⁰ and establishing "an internal market."¹¹ If the CESL could substantially help the EU solidify the internal market by reducing the transaction costs in cross-border trade created by the existence of differing legal regimes, then it would comply with the subsidiarity principle.

This Comment argues, however, that the CESL violates the subsidiarity principle. The CESL would hinder the internal market's development and would not enhance consumer protections. Its opt-in nature encourages traders to avoid the cross-border market until other parties incur the first-mover costs¹² associated with adopting the regime. The CESL would pose significant risks to the first traders who use it. It would have no existing precedent, could not guarantee consistent rulings from national courts, would impose particularly restrictive consumer protections that will discourage traders, and would still make traders responsible for complying with various national contract laws in those spheres where the CESL would not apply. Since a woefully insufficient number of traders are likely to adopt the CESL, it will not help the EU solidify the internal market. Therefore, the costs and limited benefits of implementation do not justify the EU's involvement in contract law harmonization.

The Comment proceeds in five sections following this introduction. Section II explains the subsidiarity principle in the context of efficiency concerns, the democratic deficit in the EU, and relevant case law from the EU courts. Section III explores the EU's efforts to streamline cross-border trade before the CESL, as well as those CESL provisions that are relevant to the Comment. Section IV sets out the arguments for and against the CESL, as raised by the Commission and the member states. Section V presents the Comment's argument that the CESL's optional nature prevents it from satisfying the subsidiarity principle. Lastly, Section VI briefly concludes by emphasizing the principle's potential value in qualitatively analyzing different federal regimes in the twenty-first century.

¹⁰ Treaty on European Union, 1992 OJ (C 191), preamble (TEU).

¹¹ *Id.* at Art 3(3).

¹² "First-mover costs" are those costs that affect only the firms that are first to deploy their labor and/or capital in an emerging field, industry, innovation, or the like. See generally Marvin B. Lieberman and David B. Montgomery, *First-Mover Advantages*, 9 *Strat Mgmt J* 41 (1988).

II. A POLITICAL AND ECONOMIC FRAMEWORK FOR THE SUBSIDIARITY PRINCIPLE

A. Efficiency Analysis of the Subsidiarity Principle

Subsidiarity was first expressly incorporated¹³ into EU jurisprudence in Article 5 of the Treaty on European Union of 1992 (TEU), which formally established the EU:

[I]n areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹⁴

On its face, the subsidiarity principle—as defined in the TEU—appears to endorse a straightforward efficiency inquiry when adopting new EU legislation: does centralization toward Brussels create larger efficiency gains than decentralized action, in a particular sphere where the EU currently lacks sole authority to act?¹⁵ Compliance with the subsidiarity principle could be solely determined according to a two-part efficiency test, which maps onto the text of Article 5 of the TEU:

- (1) Sufficiency: the EU may take action only if the member states have acted ineffectively or have not acted at all despite the need for action.
- (2) Value Added: the EU may take action only if that action would create greater net benefits than the member states acting individually or in concert.¹⁶

While this Comment will not apply this test, there are two general efficiency gains to decentralized authority that could justify the subsidiarity principle's presumption against centralization. First, and most obviously,

¹³ Subsidiarity first appeared—although not by that name—in Article 5 of the European Coal and Steel Community (ECSC) of 1951. The earliest predecessor to the EU, the ECSC was a six-nation organization designed to coordinate (unsurprisingly) coal and steel production within a common market. According to Article 5, the ECSC was allowed to “take direct action with respect to production and the operation of the market *only when circumstances make it absolutely necessary.*” Treaty Establishing the European Coal and Steel Community, 261 UN Treaty Ser 140 (1951) Art 5 (emphasis added).

¹⁴ TEU, Art 5(3) (cited in note 10). The General Court refused to formally recognize the subsidiarity principle before the TEU entered into force. Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v Commission* [1995] ECR II-289 ¶ 331.

¹⁵ See, for example, Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 Colum J Eur L 231, 234–6 (2011) (arguing that the subsidiarity principle is “simply an economic principle of governance”).

¹⁶ Id (deriving the two-pronged efficiency test from Article 5(3)).

decentralization produces a wider array of regulations. Since no set of regulations remains completely static after passage, decentralization offers political subunits (in this case, the member states) the opportunity to experiment with different sets of regulations.¹⁷ Local governments can gather relevant information at a lower cost to design regulations specific to their constituents, which then generates new information for other governments regarding the costs and benefits of different regulations. Second, decentralization imposes limits on the centralized authority's administrative costs. Since governments are accountable to electorates that are commonly hostile to increased taxation and are forced to compete with each other, they have greater incentives to provide effective legal rules and regulations at lower costs.¹⁸ In the language of the Tiebout model,¹⁹ federalism helps individuals maximize their personal utilities by allowing them to choose between different local governments' sets of public goods provision.

Despite the benefits of diverse regulatory mechanisms across a federal regime, allowing member states to retain authority in a particular sphere may still lead to member states' laws converging in that sphere. Competition among member states for foreign trade and investment can encourage "Darwinian evolution whereby the most efficient rules survive" based on which rules are most attractive to foreign traders.²⁰ This possibility is still a win-win situation for

¹⁷ See, for example, *id.* (cited in note 15) ("Decentralization enables economic agents to discover the regulation best suited to their needs in both formal and substantial terms."); Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J Econ Lit 1120, 1131–33 (1999); Martti Vihanto, *Competition Between Local Governments as a Discovery Procedure*, 148 J Inst Theoretical Econ 411, 415 (1992); *United States v Lopez*, 514 US 549, 583 (1995) (Kennedy concurring) (concluding that a federal ban on guns near schools "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"); *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizen choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

¹⁸ Ulrich Thiepen, *Fiscal Federalism in Western European and Selected other Countries: Centralization or Decentralization? What is Better for Economic Growth?* 5 (Deutsches Institut für Wirtschaftsforschung 2000), online at <http://www.econstor.eu/bitstream/10419/18209/1/dp224.pdf> (visited Apr 14, 2013) ("Pareto efficiency can be raised through fiscal decentralization.").

¹⁹ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416, 421 (1956).

²⁰ Portuese, 17 Colum J Eur L at 238 (cited in note 15), citing Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, in Paul H. Rubin and Samuel C. Dobbs, eds, *The Evolution of the Efficient Common Law* 643–44 (Emory 2007) ("[T]he market for law created by the polycentric nature of the historic common law gave rise to a pro-efficiency dynamic of market competition. . . . At the same time, this non-hierarchical and decentralized institutional structure insulated the common law from rent-seeking pressures and constrained judges."). For a discussion of legislature-driven (rather than market-driven) harmonization, see Saul Levmore, *Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law* *6 (University of Chicago Institute for Law and Economics Working Paper No 387, June 2012), online at

member states, the local populations, and the EU, despite the lack of regulatory variety across states. The member states could maintain legislative control, the people would benefit from the most efficient set of rules and still hold elected representatives accountable for those rules, and the EU would move closer to completing the internal market.

Nevertheless, these efficiency benefits are not so clear-cut in practice. Few, if any, member states can claim to represent populations with homogenous preferences. Nor can they claim that their respective populations enjoy the requisite perfect information, mobility, or legal awareness to “shop” member states’ different regulatory regimes (as the Tiebout model would suggest). Furthermore, allowing member states to converge towards one set of rules on their own could lead to a race to the bottom rather than the top (depending on how one frames the issues), which centralized homogenization could theoretically avoid. For these reasons, it is difficult to determine solely through an efficiency analysis whether the subsidiarity principle favors devolved or federal authority.

B. Decentralization as a Response to the Underlying Democratic Deficit in the EU

Ultimately, however, the subsidiarity principle is not strictly an economic²¹ or political doctrine.²² Analyzing the subsidiarity principle *only* in terms of efficiency ignores the background tension between the EU and the member states. The Protocol on the Application of the Principles of Subsidiarity and

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079295 (visited Apr 14, 2013) (arguing that harmonization emerges either when an interest group or majority is sufficiently well-organized to trump local interests or when authorities see it “as a useful means of promoting group identity”).

²¹ See Portuese, 17 Colum J Eur L (cited in note 15) (arguing that the subsidiarity principle enshrines an economic efficiency doctrine).

²² For a discussion of the political aspects of subsidiarity, see generally Robert Schütze, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, 68 Cambridge L J 525 (2009); Robert Schütze, *From Dual to Co-operative Federalism* (Oxford 2009); Mattias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 Eur L R 503 (2006); Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J Common Mkt Studies 281 (2006) (arguing that the 2004 Protocol reduces the democratic deficit and, therefore, better ensures subsidiarity compliance by the EU); Renaud Dehousse, *Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?*, 17 West Eur Pol 118 (1995) (arguing that the subsidiarity principle was strictly a political message to the EU); Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell 1998) (discussing the deliberations between the member states regarding whether a subsidiarity provision was necessary in the TEU).

Proportionality of 2007 (the 2007 Protocol)²³ highlights this tension. The 2007 Protocol states that the member states must “ensure that decisions are taken as closely as possible to the citizens of the Union.”²⁴ While this statement does not mean that the level of government closest to the citizen must take every action, it highlights a predominant concern among the member states that the EU suffers from a democratic deficit, which is traditionally defined as a lack of political accountability that derives from the non-majoritarian nature of EU institutions.²⁵

Opponents of expanding EU authority argue that the absence of political contests for EU leadership makes it impossible for citizens to influence EU policies, which encourages an internal market that disproportionately benefits

²³ Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2007 OJ (C 306) 150 (Dec 13, 2007) (2007 Protocol). In 1997, the Treaty of Amsterdam annexed to the TEU an early version of the protocol. Protocol on the Application of the Principles of Subsidiarity and Proportionality, 1997 OJ (C 340) 105 (Nov 10, 1997) (1997 Protocol). In 2007, the Lisbon Treaty replaced the 1997 Protocol with a new protocol under the same name. The main difference was the new role given to national parliaments in ensuring compliance with the subsidiarity principle. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 OJ (C 306) (Dec 13, 2007). See also Vesna Naglic and Danaï Papadopoulou, *The Principle of Subsidiarity* *1–2 (European Union Parliament, Oct 2012), online at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf (visited Apr 14, 2013). The beginnings of this change appeared in 2004, in the version of the protocol that was included in the (ultimately not ratified and thus nonbinding) Treaty establishing a Constitution for Europe, 2004 OJ (C 310) 207 (Dec 16, 2004). Therefore, this greater role for national parliaments had already been envisioned during the later years of the CESL’s development.

²⁴ Id at preamble.

²⁵ Ben Crum, *Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?*, 11 Eur L J 452 (2005) (arguing that establishing effective representative democracy requires a shift towards legislature-centric politics and the elimination of the EU polity’s multilevel character); Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union* (Oxford 2005) (arguing that the lack of cultural cohesion among the member states and weak participation rights in the EU, among other factors, hinder the development of classic democratic politics in EU); David Beetham and Christopher Lord, *Legitimacy and the European Union*, in Albert Weale and Michael Nentwich, eds, *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* 18 (“[T]he inadequacy of parliamentary scrutiny of national legislation is compounded by the expansion of European law, and intensifies in turn the democratic deficit at the supranational level.”); Frank Decker, *Governance Beyond the Nation-State: Reflections on the Democratic Deficit of the European Union*, 9 J Eur Pub Pol 256 (2002) (suggesting a presidential model for EU governance and integration of foreign policy, defense, and security to reduce the EU’s democratic deficit). For further commentary on the democratic deficit, see generally Beate Kohler-Koch and Berthold Rittberger, *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield 2007) (summarizing the scholarship regarding whether a democratic deficit actually exists in the EU); Thomas D. Zweifel, *Democratic Deficit?: Institutions and Regulations in the European Union, Switzerland, and the United States* (Lexington 2004) (arguing that the EU’s decisionmaking and regulatory regimes do not demonstrate a democratic deficit that is any greater than that found in most liberal democracies).

some member states and interest groups at the expense of others.²⁶ Some have even accused the EU of operating as “an enlightened form of benevolent authoritarianism.”²⁷ While there are elections for European Parliament, legislative initiative (the ability to propose laws) remains with the Commission. Members of the Commission are appointed by national legislatures rather than elected. Because the EU Parliament has severe institutional limitations on its power and a weak direct relationship with its electorate, the EU has failed to develop stable, representative coalitions that allow citizens to engage in EU-wide policy debates.²⁸ Additionally, the aforementioned efficiency-based benefits of decentralization may encourage local populations and/or member state governments to decide that there are decreasing normative benefits to participating in EU objectives. Even if decentralization is *not* the most efficient outcome, the ideological and political emphasis on local governance can make citizens and member states reluctant to cede more authority to the EU.²⁹ The fact that the 2007 Protocol begins by prominently reaffirming the importance of minimizing the democratic deficit shows how sensitive member states have been to relinquishing any authority to the EU.³⁰

The subsidiarity principle can serve a crucial legal function: establishing the guidelines by which the member states and the EU negotiate the limits of the EU’s authority. I purposefully use the verb “negotiate” rather than “enforce” to emphasize that there is no truly static line between the powers held by different levels of governments. In an individual federal nation-state’s constitutional order, there is normally a *de jure* presumption that the division between the

²⁶ Simon Hix, *What’s Wrong with the European Union and How to Fix It* 58, 77 (Polity 2008).

²⁷ Andreas Follesdal and Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J Common Mkt Studies 533, 533 (2006).

²⁸ See Hix, *What’s Wrong with the European Union* at 85 (cited in note 26):

What is missing is the substantive content of democracy: a battle for control of political power and the policy agenda at the European level, between rival groups of leaders with rival policy platforms, where the winners and losers of this battle are clearly identifiable, and where the winners have a reasonable chance of losing next time round and the losers have a reasonable chance of winning. Without such a democratic contest we simply do not know, *a priori*, whether the policies of the EU really are the choices of the European citizens.

²⁹ Compare Portuese, 17 Colum J Eur L at 239 n 42 (cited in note 15) (“Ultimately, the efficiency gains from decentralization may lead to a political disintegration of the States. When combined with economic integration of governments, the decentralization process allows for economic benefits to be maximized while the political benefits of belonging to a particular State shrink drastically.”); Michele Ruta, *Economic Theories of Political (Dis)Integration*, 19 J Econ Surveys 1, 17 (2005) (suggesting that cross-border economic integration between member states has encouraged regions with devolved legislative competencies to push for separation from their respective member states).

³⁰ See the 2007 Protocol (cited in note 23).

federal government's authority and the subnational authorities is fixed (unless otherwise formally amended).³¹ Subsidiarity in the EU context, however, presumes that "the Community exercises its powers when member states are unable to achieve the objectives of the Treaties satisfactorily."³² The Protocol on the Application of the Principles of Subsidiarity and Proportionality of 1997,³³ which elaborated on the Article 5 subsidiarity principle without changing its substance, states that:

[s]ubsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty [establishing the European Community]. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.³⁴

This implies that the scope of EU authority changes according to whether the member states agree that power ought to be shifted to the EU with respect to a particular issue. An active dialogue between the member states and the EU can facilitate a stronger connection between EU citizens' interests and EU policymaking, which could mitigate the democratic deficit.

Beyond alleviating the democratic deficit, subsidiarity can provide "a conceptual alternative to the comparatively empty and unhelpful idea of state sovereignty."³⁵ It reaffirms the idea that the distribution of authority between levels of government is subject to change over time under the strain of economic and political influences.³⁶ The subsidiarity principle formally acknowledges *de jure* and *de facto* negotiations between the center and the subunits, a process that thrives without being expressly recognized in many other federal systems. The principle also demonstrates that the EU and the

³¹ To use the US as an example, while the Supreme Court has held that the Tenth Amendment is "but a truism," subject to the evolving constitutional demands on the federal government, the American public generally assumes that the division between state and federal power remains static. *United States v Darby*, 312 US 100, 124 (1941); see also US Const Amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.").

³² Roberta Panizza, *The Principle of Subsidiarity* (European Parliament, July 2008), online at http://circa.europa.eu/irc/opoce/fact_sheets/info/data/how/characteristics/article_7148_en.htm (visited Apr 14, 2013).

³³ 1997 Protocol (cited in note 23).

³⁴ *Id* at Art 3.

³⁵ Paulo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am J Int L 38, 40 (2003).

³⁶ Consider Alison L. LaCroix, *The Interbellum Constitution and the Spending Power* (University of Chicago Public Law and Legal Theory Working Paper No 420, February 2013), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228335 (visited Apr 14, 2013) (discussing the evolution of the United States Congress's spending power during the early nineteenth century to demonstrate that constitutional federalism is not fixed).

member states anticipated that future issues would arise that they would have to resolve collaboratively. Article 4 of the TEU says as much: member states are required to “take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties” and “facilitate the achievement of the Union’s tasks,”³⁷ which includes completing the internal market. That process requires the member states to take individual action or to cede authority to EU institutions so that they may take action.

C. Subsidiarity Case Law: Skirting the Centralization Debate

Unfortunately, perhaps in part because the subsidiarity principle normally arises in policy debates between member states rather than in litigation, the existing case law is meager. The European Court of Justice (ECJ) has, up to this point, limited its inquiry to procedural concerns (whether the subsidiarity argument in a given case makes sense) rather than substantive concerns (whether the subsidiarity argument is correct in a particular case).³⁸ For example, in a case involving the Treaty on the Formation of the European Union (TFEU) prohibition on discrimination by carriers against goods departing from or entering particular member states,³⁹ the ECJ refused to grant the European Parliament a “general power to regulate the internal market.”⁴⁰ The ECJ has also held that the mere existence of differences in member states’ laws is not a sufficient justification for EU intervention: the disparities must create an obstacle to establishing the internal market.⁴¹ The subsidiarity principle does not grant the EU “exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning by eliminating barriers to the free movement of goods . . . or by removing distortions of competition.”⁴²

³⁷ TEU, Art 4(3) (cited in note 10).

³⁸ Thomas Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 J Common Mkt Studies 267, 270–71 (2011) (stating that the ECJ has focused on whether or not EU actions have valid legal bases); Portuese, 17 Colum J Eur L at 250 (cited in note 15) (“The ECJ’s settled jurisprudence on judicial review for subsidiarity demonstrates that this review is limited to procedural subsidiarity.”).

³⁹ Case C-376/98 *Germany v Parliament (Tobacco Advertising)* [2000] ECR I-8419; see also Treaty on the Formation of the European Union, 2008 OJ (C 115) 47 (TFEU), Art 95:

In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the goods over the transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited.

⁴⁰ *Tobacco Advertising*, ECR I-8419 at ¶ 83 (cited in note 39).

⁴¹ Case C-491/01 *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453.

⁴² *Id* at ¶ 179.

Subsequent cases all followed the same general premise: EU action in spheres of authority that it shares with the member states “is conditional on the existence or likely emergence of negative externalities resulting from national regulations.”⁴³

III. CESL PROVISIONS THAT COMPLICATE THE DEVELOPMENT OF EUROPEAN CONTRACT LAW

The Commission argues that the CESL enhances cross-border trade because it allows traders to avoid the alleged problems posed by decentralized, national contract regimes.⁴⁴ However, the CESL’s provisions might prevent it from significantly improving the internal market or increasing the consumer protections available to EU citizens in cross-border sales. In particular, the CESL would still invariably force traders to heavily rely on member states’ preexisting law and national courts because of its limited scope. As mentioned previously, Article 7 limits the CESL’s applicability to cross-border contracts where at least one party is a trader. When all the parties are traders, one must be an SME.⁴⁵

Despite this default rule, Article 13 does permit member states to make the CESL available to all domestic transactions and/or to all transactions between

⁴³ Horsley, 50 J Common Mkt Studies at 272 (cited in note 38). See also Joined Cases C-154 & C-155/04, *The Queen v Secretary of State for Health* [2005] ECR I-6451; Case C-103/01, *Commission v Germany* [2003] ECR I-5369; Case C-377/98, *Netherlands v Parliament* [2001] ECR I-7079.

⁴⁴ CESL at 11 (cited in note 1) (claiming that the CESL resolves many of “the most prevalent problems which could arise in cross-border situations”).

⁴⁵ Id at Art 7(1). Article 7 defines an SME as a trader that has fewer than 250 employees and “has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.” Id at Art 7(2). The main reason for restricting the CESL’s scope to SMEs was to “justif[y] [] the Proposal in the field of [business to business] contracts.” Reiner Schülze, ed, *Common European Sales Law (CESL)—Commentary* 53 (Nomos Verlag 2012). See also CESL at 2 (cited in note 1) (“The obstacles which stem from [differences in contract law] dissuade traders, [SMEs] in particular, from entering cross border trade or expanding to new member states’ markets.”). Because over 99 percent of all European businesses are SMEs, the Commission rightly believes that completing the internal market depends on SMEs’ engaging in cross-border trade. *Enterprise and Industry: Small and Medium-Sized Enterprises* (European Commission, Oct 18, 2012), online at http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/index_en.htm (visited Apr 14, 2013); *Small and Medium-Sized Enterprises* (European Parliament, Jan 2012), online at http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.15.pdf (visited Apr 14, 2013). The Commission highlighted the importance of SMEs in its “Europe 2020 Strategy” seeking to recover from the 2008 recession “and turn the EU into a smart, sustainable and inclusive economy.” *Europe 2020—A Strategy for Smart, Sustainable and Inclusive Growth* *5, COM(2010)2020. The Strategy specified four initiatives directed at creating more conducive environments for SMEs in cross-border trade: improving “conditions and access to finance for research and innovation,” expanding high-speed internet access, generally “improv[ing] the business environment, notably for SME’s,” and “modernis[ing] labour markets.” Id at 5–6.

traders, regardless of size.⁴⁶ Allowing member states to make the CESL available for contracts between large traders could appeal to a member state that wanted to encourage large traders to market their goods and services to other large traders in the domestic market without going through the complicated Article 7 inquiries.⁴⁷ If, however, one member state agrees to allow the CESL for domestic contracts, Article 13 would still prevent parties from selecting that member state's national law (which would include the CESL) and apply the CESL to a domestic contract in another member state that has not done so.⁴⁸

In the event that a member state does not exercise its right to extend the CESL to all sales contracts within its jurisdiction, traders who use the CESL would still need to refer to national contract laws when they engage in cross-border transactions. This is because Article 6 prevents the CESL from applying to contracts that involve “any elements other than the sale of goods, the supply of digital content and the provision of related services.”⁴⁹ The term “related service[]” is defined as “any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller.”⁵⁰ This definition excludes transport, training, telecommunications support, and financial services.⁵¹ Article 6 also prevents parties from entering “mixed-purpose contracts,” combining the sale of goods and services with other, barred services.⁵² Traders will almost certainly want to engage in cross-border transactions that do not constitute sales contracts under the CESL. If a trader wants to extend its entire business to another member state's market, it would still need to adapt to that member state's other relevant contract law

⁴⁶ CESL, Art 13 (cited in note 1):

A member state may decide to make the [CESL] available for: (a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that member state; and/or (b) contracts where all the parties are traders but none of them is an SME.

The Commission also believes that the CESL “should [] be available to facilitate trade between member states and third countries,” but still subject to “applicable conflict-of-law rules.” *Id.* at 17.

⁴⁷ *Id.*

⁴⁸ Schülze, ed, *CESL Commentary* at 80 (cited in note 45).

⁴⁹ CESL, Art 6(1) (cited in note 1).

⁵⁰ *Id.* at Art 2(m).

⁵¹ *Id.* It is not clear how far the first three exclusions extend, however. For example, does the bar on transport services include transport of both goods and passengers? Does a seller violate the CESL if he explains to a consumer how to use his goods safely? Do hotlines count as telecommunication support services? Schülze, ed, *CESL Commentary* at 47 (cited in note 45).

⁵² CESL, Art 6(1) (cited in note 1).

principles. Therefore, traders who use the CESL would *add* to their operating costs rather than reduce them.

Although the EU courts would be the final courts of appeals for litigation under the CESL, member states' courts would each enforce and interpret the CESL separately, developing their own CESL jurisprudence.⁵³ The Commission included Articles 58 through 69 to help national courts interpret the CESL. These provisions ask courts to interpret first the agreement between the parties to determine the written contract terms, but they would not apply to unilateral statements or other conduct outside of contractual agreements.⁵⁴ Similarly to other international contract laws,⁵⁵ Article 58 requires that contracts "be interpreted according to the common intention of the parties" or the "recognizable unilateral intention" of one party.⁵⁶ Article 59 outlines a non-exhaustive list of the means of interpretation, which may include circumstances surrounding the preliminary negotiations, the conduct of the parties after the contract's conclusion, and "the meaning commonly given to expressions in the branch of activity concerned."⁵⁷ The parties have discretion to decide which actors a court may consider when interpreting the agreement.⁵⁸ But since traders will likely have complete control over sales contracts with consumers, Article 64 also requires courts to interpret contracts in favor of consumers.⁵⁹ Parties are not permitted to negotiate to make Article 64 inapplicable.⁶⁰ When Article 64 does

⁵³ Id at Art 14; see generally Law Commission and Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems—Advice to the UK Government* (Nov 10, 2011), online at http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf (visited Apr 14, 2013). See also Lisa Bernstein, *An (Un)Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL* *18 (University of Chicago Institute for Law and Economics Olin Research Paper No 606, May 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2067196 (visited Apr 14, 2013) (arguing that the CESL more likely encourages cross-border trade by providing clearer default rules and promoting a "jurisprudential approach reflected in the common law of New York").

⁵⁴ Schölze, ed, *CESL Commentary* at 304 (cited in note 45).

⁵⁵ See, for example, United Nations Convention on contracts for the international sale of goods (1980), 1489 UN Treaty Ser 58, Art 8 (1988) (CISG).

⁵⁶ CESL, Art 58(1)–(2) (cited in note 1) Art 58(2) states:

Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.

⁵⁷ Id at Art 59.

⁵⁸ Schölze, ed, *CESL Commentary* at 308 (cited in note 45). To ensure internal consistency of expressions' meanings, courts are also required to interpret "[e]xpressions used in a contract . . . in the light of the contract as a whole." CESL, Art 60 (cited in note 1).

⁵⁹ Id at Art 64(1).

⁶⁰ Id at Art 64(2).

not apply (such as in a sales contract between non-SME traders), courts must construe the meaning of unclear terms to the disadvantage of the party that supplied them.⁶¹

Articles 58 through 69 may increase both traders' and consumers' comfort levels with the CESL regime. Their default rules are either closely related to preexisting international contract law regimes⁶² or reinforce the CESL's goal of improving consumer protections. To encourage uniform interpretation, Article 14 also requires that national courts submit their decisions to a Commission-managed database that the public can access.⁶³ The database would also include relevant case law from the EU courts.⁶⁴ Nevertheless, it is not clear whether the decisions would be translated into other languages (and if so, which ones), who would be responsible for providing summaries of decisions, whether those decisions would bind other national courts or merely be persuasive authority, or what the search logic for the database would be. Overall, there is simply no way to guarantee that national courts would cooperate to create uniform precedents that traders could rely on in all of their cross-border sales.

The CESL also interacts awkwardly with the Rome I Regulation of 2009 (Rome I), which established EU-wide default conflict rules for contracts without forum-selection clauses.⁶⁵ Rome I states that, in the absence of a forum-selection clause, "a contract for the sale of goods shall be governed by the law of the country where the trader has his habitual residence."⁶⁶ If circumstantial evidence indicates that the contract is "manifestly more closely connected" to another country than that of the trader's habitual residence, then that country's laws apply.⁶⁷ The applicable law for consumer contract disputes is determined by whether "the professional . . . pursues his commercial or professional activities in the country where the consumer has his habitual residence, or . . . directs such activities to that country."⁶⁸ The line between "directing" and "not directing," however, is frustratingly blurry. For example, a Portuguese business would be

⁶¹ Id at Art 65.

⁶² Schülze, ed, *CESL Commentary* at 304–24 (cited in note 45).

⁶³ CESL, Art 14 (cited in note 1).

⁶⁴ Schülze, ed, *CESL Commentary* at 81 (cited in note 45).

⁶⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 OJ (L 117), Art 4(1), 6(1) (Rome I).

⁶⁶ Id at Art 4(1). Article 19 defines "habitual residence" as the place "[w]here the contract is concluded in the course of the operations of a branch, agency, or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency, or establishment, the place where the branch, agency or any other establishment is located." Id, Art 19. This definition has encountered little scrutiny as of this time.

⁶⁷ Id at Art 4(3).

⁶⁸ Id at Art 6(1).

directing its activities to Estonia if it actively advertised to Estonians, thereby making Estonian consumer protections applicable. That Portuguese business would be subject to Portuguese law if it merely created a website that a consumer in Estonia could access. However, if the business regularly accepted orders from Estonians without adjusting its business practices to encourage further orders, it is not clear that it was still directing its activities to Estonia. This is one example of the ambiguities that Rome I created and which the CESL would not solve. By design, Rome I did not create a comprehensive contract law for the EU. Consequently, because the Commission has framed the CESL as a second national contract law for each member state, when traders select the CESL, Rome I would be applied first to determine which member state's laws governed the contract in the spheres where the CESL did not apply. This means that the CESL could reduce but would not completely eliminate the need for conflict rules for traders that chose to operate under it.

The final potential obstacle for traders—and the one that may ultimately discourage most of them from taking the risk of adopting a regime without precedents or set of contract law rules—is the CESL's notably strong consumer protections. First, consumers have up to ten years to claim their rights for faulty products, digital content, or services—and up to thirty years for personal injuries.⁶⁹ Next, Article 40 gives consumers the right to withdraw without penalty from “distance contracts”⁷⁰ and “off-premises contracts”⁷¹ even if the contract would be otherwise irrevocable according to other provisions in the CESL.⁷² Third, to the detriment of traders, who would want to create boilerplate terms and conditions for online sales, any contract terms that are “not individually negotiated within the meaning of Article 7” may not be invoked if the other

⁶⁹ CESL, Art 179 (cited in note 1).

⁷⁰ Distance contracts include any sales or service contract that is concluded without both the trader and consumer being physically present and with the exclusive use of at least one form of “distance communication.” *Id.* at Art 2(p).

⁷¹ *Id.* at Art 2(q). As defined in Art 2(q), an “[o]ff-premises contract” includes:

[A]ny contract between a trader and a consumer: (i) concluded in the simultaneous physical presence of the trader or, where the trader is a legal person, the natural person representing the trader and the consumer in a place which is not the trader's business premises, or concluded on the basis of an offer made by the consumer in the same circumstances; or (ii) concluded on the trader's business premises or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the trader's business premises in the simultaneous physical presence of the trader or, where the trader is a legal person, a natural person representing the trader and the consumer; or (iii) concluded during an excursion organised by the trader or, where the trader is a legal person, the natural person representing the trader with the aim or effect of promoting.

⁷² See generally *id.*, Art 40–44.

party was unaware of them.⁷³ Finally, consumers have a separate, express right to terminate: they can return defective products and receive a full refund instead of asking for any repairs or replacement.⁷⁴ Furthermore, unlike the ten-year limit warranty provision, there is no statutory time limit on consumers' right to terminate.⁷⁵ Given these strong consumer protections, so long as the CESL is an optional instrument instead of a mandatory directive, traders still have an incentive to investigate the twenty-six other foreign consumer contract laws and select the regime with the most favorable consumer protections.

IV. LEGAL ARGUMENTS FOR AND AGAINST THE COMMON EUROPEAN SALES LAW'S COMPLIANCE WITH THE SUBSIDIARITY PRINCIPLE

A. The Commission's Legal Support

The Commission relies on several forms of support to defend the CESL. To prove that the CESL is permitted under the EU treaties, the Commission uses⁷⁶ TFEU Article 114(1), which states:

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market.⁷⁷

This article allows the EU to create legislation that aggregates preexisting member states' laws. Article 114(1) allows the Commission to argue that the CESL merely offers contracting parties a choice between two contract law regimes "*within* the national law of each member state" rather than "a choice of the applicable law within the meaning of private international law rules."⁷⁸ This reasoning has two benefits. First, the Commission can argue that it is not attempting to replace national contract laws *de facto* (instead of expressly

⁷³ Id at Art 70.

⁷⁴ CESL, Art 117 (cited in note 1).

⁷⁵ While the lack of a time limit is generally favored as "a short-term remedy of first instance," it could actually place consumers at a disadvantage. Law Commission and Scottish Law Commission, *The Law Commission and Scottish Law Commission Consumer Remedies for Faulty Goods—Summary of Responses: Overview 1* (May 2009). Businesses could argue that consumers who take longer to invoke the right to terminate are not acting in good faith because they are taking advantage of the lack of a statutory time limit to delay declaring the defect.

⁷⁶ CESL at 8 (cited in note 1), citing TFEU, Art 114(1) (cited in note 39).

⁷⁷ TFEU, Art 114(1) (cited in note 39).

⁷⁸ CESL at 9 (cited in note 1) (emphasis added).

repealing them). Rather than competing with national contract laws, the Commission describes the CESL as complementing member states' preexisting contract laws. Second, the Commission can take advantage of Article 114(3) of the TFEU, which requires that any approximation of member states' laws be construed to favor "a high level of [consumer] protection."⁷⁹ Taking the provisions of Article 114 together, the Commission can assert that the CESL would improve consumer protections—satisfying 114(3)—and increase consumer confidence in cross-border purchasing, thereby strengthening the internal market—satisfying 114(1).

Along the same lines as its Article 114 argument, the Commission declares that the CESL complies with the subsidiarity principle. It states that the CESL is intended to "improve the establishment and the functioning of the internal market and bring benefits to traders, consumers, and member states' judicial systems."⁸⁰ In light of the allegedly higher transaction costs arising from having twenty-six contract laws, the Commission argues that the internal market cannot be fully realized until there is a set of contract rules that both applies across the entire EU and "cover[s] [] the lifecycle of a cross-border contract."⁸¹ The member states alleged inability to "remove the additional transaction costs and legal complexity" may limit consumer choices and simultaneously reduce consumer confidence, "which comes from knowledge of their rights."⁸² A single body of law could also reduce the cost of resolving contract disputes by reducing the workload for national judges, who currently need to research foreign laws under the conflict-of-law rules regime.⁸³ The Commission also crucially argues that "the objective" of uniform contract laws—solidifying the internal market, reducing transaction costs in cross-border sales, and improving consumer protection—is more appropriately achieved at the EU level:

The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions. Furthermore, as market trends evolve and prompt member states to take action independently, for example in regulating the emerging digital content market, regulatory divergences

⁷⁹ TFEU, Art 114(3) (cited in note 39) ("The Commission, in its proposals . . . concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.").

⁸⁰ CESL at 5 (cited in note 1).

⁸¹ *Id.* at 22.

⁸² *Id.* at 9.

⁸³ *Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses* 10, COM(2010)348.

leading to increased transaction costs and gaps in the protection of consumers are likely to grow.⁸⁴

In a companion document to the CESL, the Commission also specifically rejects the argument that conflict rules adequately reduce transaction costs on the grounds that conflict rules cannot eliminate the substantive differences in member states' laws.⁸⁵

Since the TEU's ratification, the Commission has also asserted that the internal market will never be complete without EU-wide consumer protections grounded in uniform contract principles.⁸⁶ According to this reasoning, failing to guarantee the same protections in cross-border transactions weakens consumer confidence in the internal market, which discourages them from making cross-border purchases and thereby stymies the internal market's continued development.⁸⁷ While consumer protection was originally assumed to be the domain of national legislatures, policymakers both in EU institutions and the member states have gradually come to view "[i]mproving the standard of living [not] only in a quantitative way (increase in income and purchasing power of individuals) but also qualitatively, aiming to improve, in the widest sense of the term, the living conditions of European citizens."⁸⁸ Therefore, the CESL's dual

⁸⁴ CESL at 9 (cited in note 1).

⁸⁵ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to Facilitate Cross-Border Transactions in the Internal market* 4, COM(2011)636 ("Companion Document").

⁸⁶ See Norbert Reich, *From Minimal to Full to "Half" Harmonisation*, in James Devenney and Mel Kenny, eds, *European Consumer Protection: Theory and Practice* 3 (Cambridge 2012); W.C.H. Irvine, *Consumer Law in Scotland* 19 (W. Green & Son 3d ed 2004). Because the EU has evolved dramatically since its conception as the ECSC, the EU's involvement in cross-border trade has developed haphazardly. When the EU has made further encroachments into cross-border trade, it has normally focused on consumer protections. Interestingly, the term "consumer protection" did not even appear in a European Community treaty until the Single European Act of 1986, which established the internal market as an objective for the European Community. Single European Act, 1987 OJ (L 169), Art 18. Nor was there a separate policy for consumer law until the TEU. TEU, Art 129(a) (cited in note 10):

The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted . . . in the context of the completion of the internal market; [and] (b) specific action which supports and supplements the policy pursued by the member states to protect the health, safety and economic interests of consumers.

⁸⁷ The Sutherland Report, published in 1992, articulated this concern: consumer confidence tends to decline when there are doubts about product quality and uncertainties about consumers' legal rights in other member states. High Level Group on the Operation of the Internal Market, *The Internal Market After 1992: Meeting the Challenge* (Report to the EEC Commission, Oct 1992). See also Reich, *From Minimal to Full to "Half" Harmonisation* at 3 (cited in note 86).

⁸⁸ Thierry Bourgoignie, *European Community Consumer Law and Policy: from Rome to Amsterdam*, 1998 *Consum L J* 443, 444 (1998).

objectives of further consolidating the internal market and enhancing consumer protections are one and the same.

To further defend the CESL's conformance with subsidiarity, the Commission relies on several secondary source materials either produced or sponsored by various EU institutions. It refers⁸⁹ to a European Parliament Resolution wherein the Parliament agreed that the EU's "internal market remains fragmented."⁹⁰ The Commission also cites a series of surveys to show that the current cross-border sales regime hinders a significant number of traders and consumers who want to, but cannot, engage in cross-border trade. The Proposal mentions Flash Eurobarometer 320 and 321—surveys conducted by the Gallup Organization and sponsored by the Commission—alleging "traders ranked contract-law-related obstacles among the top barriers to cross-border trade."⁹¹ The Companion Document to the CESL⁹² cites Flash Eurobarometer 299, which states that 44 percent of consumers believe uncertainty about their rights discourages them from purchasing goods and services from other member states.⁹³ That same survey found that one third of consumers would consider buying goods and services from other member states online if uniform European rules existed. However, only 7 percent currently do so.⁹⁴ The Companion Document discusses these studies in a manner that suggests that, since there is currently unrealized demand across the EU for cross-border goods and services, contract law harmonization is necessary to improve the internal market. Since the member states have so far failed to coordinate sufficiently to

⁸⁹ CESL at 5 (cited in note 1).

⁹⁰ *European Parliament Resolution on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, 2011/2013(INI) 2 (June 8, 2011), online at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0262+0+DOC+PDF+V0//EN> (visited Apr 14, 2013). The Parliament also stated that a European contract law "could be useful for realising the full potential of the internal market, entailing substantial economic and employment benefits." *Id.* at 4.

⁹¹ CESL at 2 (cited in note 1), citing *Flash Eurobarometer 320: European Contract Law in Business-to-Business Transactions* (Gallup Organization 2011), online at http://ec.europa.eu/public_opinion/flash/fl_320_en.pdf (visited Apr 14, 2013), and *Flash Eurobarometer 321: European Contract Law in Consumer Transactions* (Gallup Organization 2011), online at http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf (visited Apr 14, 2013).

⁹² COM(2011)636 (cited in note 85).

⁹³ *Id.* at 3 (cited in note 85), citing *Flash Eurobarometer 299a: Attitudes towards Cross-Border Trade and Consumer Protection *10* (Gallup Organization 2011), online at http://ec.europa.eu/public_opinion/flash/fl_299a_en.pdf (visited Apr 14, 2013).

⁹⁴ *Flash Eurobarometer 299: Consumer Attitudes towards Cross-Border Trade and Consumer Protection *13* (Gallup Organization 2011), online at http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf (visited Apr 14, 2013).

reduce contract law-based barriers to cross-border trade, EU-level action (via the CESL) is allegedly appropriate under subsidiarity.⁹⁵

The Commission's logic appears reasonable at first glance. Both the EU and the individual member states adhere to the principle of party autonomy in contract law: parties regularly create forum-selection clauses to select which member state's law will govern their contracts.⁹⁶ Party autonomy, however, is not always effective in transactions between SMEs and between an SME and consumers, because at least one party to the contract is likely to be completely ignorant of the contract law in another party's home country. This likelihood becomes a near certainty in Internet-based, e-commerce transactions, where identifying the relevant jurisdiction under conventional conflict rules is a very imprecise science.⁹⁷ Therefore, the CESL could benefit two groups: (1) businesses *entering* small markets who would prefer not to expend resources learning unfamiliar national contract laws, and (2) consumers and businesses *based* in small markets who would rather eliminate the transaction costs that come with operating under their nations' laws in contracts with foreigners.

B. Member States in Support

The 2007 Protocol requires that, upon any proposal's publication, EU member states vote on whether they individually believe it complies with the

⁹⁵ The UK Parliament-sponsored European Scrutiny Committee Report from November 2011 states that the Flash Eurobarometer surveys in fact did not present any research to support the conclusion that variation among national contract laws prevented consumers and businesses from participating in cross-border sales. UK House of Commons, *Reasoned Opinion of the House of Commons – Concerning a draft Regulation on a Common European Sales Law for the European Union* (Nov 23, 2011), online at <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20110284/ukcom.do> (visited Apr 14, 2013), citing European Scrutiny Committee, *Documents considered by the Committee on 23 November 2011* ¶ 5.26 (Nov 2011), online at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xlii/42807.htm> (visited Apr 14, 2013). The report specifically referenced Flash Eurobarometer 321, which found that 80 percent of traders were not “deterred by consumer contract law-related obstacles,” 72 percent of traders did not believe that compliance with different consumer protection laws was a significant barrier, and 79 percent of traders believed that an EU-wide contract regime either would not change or would increase their cross-border operating costs. European Scrutiny Committee, *Documents considered by the Committee* ¶ 5.26, citing *Flash Eurobarometer 321* at 27–28 (cited in note 91). For additional criticism of the Flash Eurobarometer Surveys, see William H.J. Hubbard, *Another Look at the Eurobarometer Surveys* (University of Chicago Institute for Law and Economics Olin Research Paper No 615, Oct 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167489 (visited Apr 14, 2013) (arguing that the data do not conclusively support the claim that SMEs and consumers are prevented from engaging cross-border trade because of the obstacles erected by differences between national contract laws).

⁹⁶ See Eugene F. Scoles, et al, *Conflict of Laws* § 18.1 (West 4th ed 2000).

⁹⁷ See Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 118–24 (Cambridge, UK: Cambridge 2010).

subsidiarity principle. Under Article 7 of the 2007 Protocol, the legislature of each member state has two votes.⁹⁸ When the Commission proposed the CESL, the majority of member states' legislative bodies that submitted opinions declared their support. Many member states, however, either did not publish an opinion or published opinions that devoted little or no space to subsidiarity.⁹⁹ The Swedish Parliament outlined the traditional line of reasoning to defend the CESL's compliance with the subsidiarity principle: the member states suffer from an incurable coordination problem that reduces consumer confidence, "which comes from knowing their rights," and thereby reduces the demand for cross-border sales.¹⁰⁰ With respect to Internet sales, the Parliament feared that regulatory differences would lead to even greater transaction costs and "gaps in consumer protection."¹⁰¹ It expressed no concern with the scope of the CESL because the Commission limited it to issues specific to cross-border trade, rather than issues "best regulated by national legislation."¹⁰² The Irish Parliament succinctly stated "this proposal does not warrant further scrutiny."¹⁰³ The Dutch government, while rejecting a European Civil Code that would preempt national contract laws,¹⁰⁴ articulated the same basic position in favor of the CESL as the Swedish Parliament.¹⁰⁵

⁹⁸ 2007 Protocol, Art 7 (cited in note 23).

⁹⁹ For the sake of brevity and avoiding repetition, I have selected only a handful of opinions.

¹⁰⁰ Swedish Parliament, *Subsidiaritetsprövning av kommissionens förslag till förordning om en gemensam europeisk köplag* (Dec 2011), online at <http://data.riksdagen.se/dokument/GZ01CU11> (visited Apr 14, 2013):

If member states pursue uncoordinated action at the national level, they will be unable to remove the additional transaction costs and legal complexity that traders face in cross-border trade in the EU due to differences in national contract law systems. Consumers will in such situations continue to encounter limited access to a small range of products from other member states. They will also continue to lack the confidence which comes from knowing their rights.

¹⁰¹ Id ("If markets develop while the member states are forced to act independently, such as regulating the emerging digital content market, the regulatory differences will lead to increased transaction costs and gaps in consumer protection.").

¹⁰² Id ("The proposal's scope is limited to issues that pose real problems in cross-border trade and do not include those issues that are best regulated by national legislation.").

¹⁰³ Irish House of Oireachtas Joint Committee on Justice, Defence and Equality, *Decision List—Meeting of 8th February, 2012* 3 (Feb 8, 2012), online at <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20110284/iesea.do> (visited Apr 14, 2013).

¹⁰⁴ "Een Europees Burgerlijk Wetboek," in the original. First Chamber of the Dutch Estates General "Standpunt Nederlandse regering," *Voorstel voor een verordening inzake het facultatief gemeenschappelijk Europees kooprecht* (Nov 27, 2012), online at http://www.eerstekamer.nl/eu/edossier/e110054_voorstel_voor_een (visited Apr 14, 2013):

An optional [CESL] can offer parties one set of rules that governs the agreement between them as completely as possible. This can ease participation in the internal market. The Netherlands rejects a European Civil Code

Portugal's Assembly framed its opinion as a direct response to legislatures that opposed the CESL.¹⁰⁶ It asserted that, assuming the “‘fragmentation of contract law’ in the European Union . . . [is] a difficulty and cost factor [that is] particularly burdensome to consumers and SMEs,” the CESL “is justified to reduce asymmetries of effects and to develop the potential contribution of such trade to the internal market and its benefits.”¹⁰⁷ This view necessarily means that (1) any existing cross-border trade is a fortunate accident that emerged in spite of member states’ lack of coordination; and (2) the member states are incompetent to coordinate their activities to increase cross-border trade (or else they would have done so already).¹⁰⁸

C. Member States in Opposition

The EU received formal objections from four national legislative bodies: the UK House of Commons, the German Bundestag, the Austrian Federal Council, and the Belgian Senate.¹⁰⁹ The UK House of Commons argued that the only certainty with the CESL was that it would “lead to higher levels of legal complexity.”¹¹⁰ Since national contract laws would govern any matters that the CESL does not address, the House anticipated that a purportedly uniform EU contract law would lead to divergent legal precedents, in spite of Articles 58

[proposal]; there is neither a sufficient basis in the [TFEU] nor a need in practice, nor a necessity from the viewpoint of the internal market.

¹⁰⁵ Id.

¹⁰⁶ Portuguese Assembly of the Republic, European Affairs Committee, *Written Opinion: COM(2011) 635* (Nov 24, 2011), online at www.ipex.eu/IPEXL-WEB/scrutiny/COD20110284/ptass.do (visited Apr 14, 2013).

¹⁰⁷ Id at 6.

¹⁰⁸ See id at 7 (stating that the CESL’s objectives could not be “[s]ufficiently achieved by the Member States acting individually”).

¹⁰⁹ See UK House of Commons, *Reasoned Opinion of the House of Commons* (cited in note 95); German Bundestag Committee on Legal Affairs, *Stellungnahme gemäß Protokoll Nr. 2 zum Vertrag über die Europäische Union und zum Vertrag über die Arbeitsweise der Europäischen Union (Anwendung der Grundsätze der Subsidiarität und Verhältnismäßigkeit)* (Nov 30, 2011), online at <http://dipbt.bundestag.de/dip21/btd/17/080/1708000.pdf> (visited Apr 14, 2013); Austrian Federal Council European Affairs Committee, *Begründete Stellungnahme gemäß Art. 23g Abs. 1 B-VG – betreffend KOM (11) 635 endg. Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht* (Nov 30, 2011), online at http://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_08609/fname_237038.pdf (visited Apr 14, 2013); Belgian Senate, *Reasoned Opinion by the Belgian Senate on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* (Dec 6, 2011), online at [http://www.europarl.europa.eu/RegData/commissions/juri/communication/2012/478715/JURI_CM\(2012\)478715_EN.pdf](http://www.europarl.europa.eu/RegData/commissions/juri/communication/2012/478715/JURI_CM(2012)478715_EN.pdf) (visited Apr 14, 2013).

¹¹⁰ UK House of Commons, *Reasoned Opinion of the House of Commons* at 10 (cited in note 95).

through 69.¹¹¹ The House derided the member states' notification requirement in Article 14 as a mere "database" which would not help national courts create consistent legal precedents.¹¹² Because of this alleged unlikelihood of legal uniformity, both legal practitioners and consumers would face greater legal uncertainty: "[D]ifferent rules would apply to the same products depending on whom [buyers] are purchasing them from and where the supplier is located."¹¹³

The German Bundestag objected on the basis of a "broad interpretation of the subsidiarity objection,"¹¹⁴ though it did not expressly define what its broad interpretation was. The Bundestag did highlight the futility of the CESL, which can be seen as an impermissible cost under the subsidiarity principle. It asserted that language barriers and pure geographical distance were more appreciable obstacles in consumer and business contracts than differences in contract law.¹¹⁵ It further pointed to "experiences"¹¹⁶ with the United Nations Conventions on Contracts for the International Sale of Goods (CISG),¹¹⁷ which has negligibly reduced transaction costs in international sales. Among the numerous gaps in the CESL's coverage, the Bundestag specifically listed "legal personality, the invalidity of a contract arising from lack of legal capacity, representation, illegality and immorality, assignment, set-off, plurality of creditors and debtors, and change of party" as spheres of contract law where consumers, businesses, and their attorneys would still have to be familiar with national contract laws.¹¹⁸

The Austrian Federal Council articulated many of the same points as the German Bundestag and the UK House of Commons. Notably, however, it argued that even if national courts did not establish divergent precedents, creating a truly uniform EU contract law "would take years and involve a risk of

¹¹¹ Id.

¹¹² Id.

¹¹³ Id at 11.

¹¹⁴ Bundestag, *Stellungnahme gemäß Protokoll Nr. 2* at 4 (cited in note 109). The German Bundesrat, the upper house in Germany's bicameral legislature, filed a separate opinion in support of the CESL. Its opinions mirror those put forth by the European Commission. German Bundesrat, *Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht 1* (Nov 25, 2011), online at http://www.bundesrat.de/cln_236/nn_8336/SharedDocs/Drucksachen/2011/0601-700/617-1-11,templateId=raw,property=publicationFile.pdf/617-1-11.pdf (visited Apr 14, 2013) (welcoming the Commission's affirmative steps towards developing EU-wide standardization).

¹¹⁵ Bundestag, *Stellungnahme gemäß Protokoll Nr. 2* at 6 (cited in note 109).

¹¹⁶ Id.

¹¹⁷ CISG (cited in note 55).

¹¹⁸ Id. Like the UK House of Commons, the Bundestag also remained unconvinced that there would be any uniformity in interpretation between national courts.

increased costs of litigation, which ultimately impedes access to the law.”¹¹⁹ It also asserted that consumers and very small SMEs that entered transactions with larger corporations would not be able to influence choice of law provisions in their contracts. Rather than promoting consumer choice, the CESL might actually give a greater commercial advantage to corporate interests. As a final parting shot to the argument that member states’ inability to coordinate impeded cross-border trade, the Council asserted that “[t]he Austrian private law regime . . . does not in any way run counter to the achievement of the goals pursued by [the CESL].”¹²⁰ Instead of an optional instrument like the CESL, the Council suggested that the EU “promote confidence-building measures at the European level in order to help eliminate the real obstacles impeding cross-border transactions,” such as language barriers, fear of fraud, and delays in delivery.¹²¹

The Belgian Senate argued that the Commission had not provided any evidence to show that the member states were unable to promote cross-border trade:

The assertion that “the Union is in the best position to remedy the problem of legal fragmentation” . . . is not adequate by itself unless one adopts a kind of circular reasoning . . . that, without taking into account the safeguards in the member states’ law, a European regulation would be more appropriate . . . with a view to establishing a uniform legal regime in this field.¹²²

Although this allegation does not actually identify any circular logic, it does highlight a flaw in the Commission’s argument. The subsidiarity principle does not require the EU to create uniform contract rules just because the member states have not done so either by agreement among their governments or by convergence of their national laws. The Belgian Senate also argued that the CESL violates the subsidiarity principle because “[it] places different legal regimes in competition with one another, whereas it ought to . . . combat [] the adverse consequences of the existence of different legal regimes.”¹²³ Rather than opposing EU-directed contract law harmonization, the Senate implicitly asserted that the Commission should have proposed a broader proposal, since the CESL’s alleged competitive aspect violates subsidiarity.

¹¹⁹ Austrian Federal Council European Affairs Committee, *Begründete Stellungnahme gemäß Art. 23g* at 2 (cited in note 109).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Belgian Senate, *Reasoned Opinion by the Belgian Senate* at 6 (cited in note 109).

¹²³ *Id.*

The French Senate's opinion made a similar point as the Belgian Senate, but ultimately did not reject the CESL.¹²⁴ It argued that the CESL would not be sufficient to help SMEs enter cross-border transactions,¹²⁵ but that "jurisdictional complexity" was a sufficiently serious problem to warrant intervention. However, it also argued that it was necessary for a contract law regime to "lift obstacles" that were not jurisdictional in nature.¹²⁶ In short, the Senate found that the CESL complied with subsidiarity, but it could not achieve its objectives on its own because it would not force national contract laws to converge.

V. SOLUTION: AN OPTIONAL INSTRUMENT VIOLATES THE SUBSIDIARITY PRINCIPLE

The CESL, in its current form, cannot achieve its primary objectives of improving the internal market and increasing consumer protections across the EU, and it therefore violates the subsidiarity principle. An opt-in system will not improve upon existing national regimes, and thereby does not comply with the subsidiarity principle. The CESL has three significant points of rigidity that are likely to scare off many, if not most, traders from using it: Article 6, Article 7, and the very strong consumer protections.

Article 6's ban on "mixed-purpose contracts"¹²⁷ imposes an arbitrary restriction on traders operating under the CESL that will be difficult to work around. Because no precedent would exist upon the CESL's adoption, traders will be unable to guarantee ex ante that a national court will find any given contract valid with respect to the goods and services it covers. Traders interested in using the CESL will still incur costs to learn member states' laws for two reasons. First, they will want to determine whether a given member state's laws and established precedents trump the benefits of the CESL's alleged uniformity.

¹²⁴ French Senate, *Proposition de Résolution Européenne sur le droit commun européen de la vente* (Feb 23, 2012), online at <http://www.senat.fr/leg/ppr11-425.html> (visited Apr 14, 2013).

¹²⁵ Id at 11:

The Senate . . . believes that unifying the applicable law will not be sufficient to open the markets and that this goal will only be accomplished by adopting one instrument, either public or resulting from a pooling of resources between enterprises, in order to facilitate small- and medium-sized enterprises' access to specific national markets.

¹²⁶ Id at 9 ("[M]aximum harmonization will reduce the legal complexity that [SMEs] confront. . . . It should also help businesses remove other non-legal barriers.").

¹²⁷ CESL, Art 6(1) (cited in note 1).

Second, if they decide to use the CESL, they still must respect two contract laws regardless of how they structure the contract.¹²⁸

Article 7 also compels traders to conduct costly and difficult investigations into foreign traders' employment figures and annual turnover. When one considers scenarios involving traders operating under mass contracts and traders negotiating with subsidiary companies with widely varying corporate structures and relationships with parent companies, the CESL risks "creat[ing] all sorts of embarrassing and difficult situations."¹²⁹ Without any large body of consistent precedent on how to resolve mistakes of fact regarding SME status under the CESL, many large traders may simply not trade under the CESL. They will take their chances with the domestic law of the member state where the other party is based and hope that their attorneys can navigate unfamiliar legal territory.

Finally, the historically high consumer protections might discourage traders from offering the CESL to consumers. One could follow the Belgian Senate's argument that the CESL would induce inappropriate competition among member states. To make the CESL more palatable, traders could lobby the EU to reduce consumer protections in the CESL. If the protections are reduced enough, they could in some cases undermine member states' consumer protection laws (which would not preempt the CESL if they were stronger). This would spur an EU-Member-State race to the bottom, not the top.¹³⁰ member states could also lower their national protections below the CESL's standards to encourage traders to target their markets. Alternatively, one could view the protections as unintentional trade barriers that actually encourage more traders to contract their businesses' scope to their domestic markets rather than expand into cross-border trade.¹³¹ This also suggests that member states would prefer to lower their protections rather than raise them to meet the CESL's current

¹²⁸ It would be simpler to allow parties to "link contracts," combining sales contracts subject to the CESL with other contracts that remain subject to the relevant national law. Schölze, ed, *CESL Commentary* at 52 (cited in note 45). While not wholly eliminating the need to refer to member states' laws, linking contracts would give traders who prefer the CESL the dual benefit of providing as much of the contract under the CESL as possible without invalidating the other components of the agreement. This revision, however, would still not remove the other issues associated with the CESL's optional character.

¹²⁹ *Id* at 57.

¹³⁰ Posner, *The Questionable Basis of the Common European Sales Law* at *9 (cited in note 5).

¹³¹ The Commission ignores the possibility that traders may prefer to engage almost exclusively in domestic trade because of "some combination of clashing regulatory regimes on the one hand and well-developed internal markets on the other." Richard Epstein, *Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should Be Scrapped* *15 (University of Chicago Institute for Law and Economics 2012), online at <http://www.law.uchicago.edu/files/files/RAE%20paper.pdf> (visited Apr 14, 2013).

standards. In short, the CESL magnifies the member states' disincentives to "supply optimal law,"¹³² especially in the presence of an optional regime.

These restrictions, in conjunction with the absence of CESL precedent, mean that any EU-wide regime would impose high costs of entry for the first traders who decide to engage in cross-border trade under the CESL.¹³³ An optional regime almost ensures that few traders would incur those costs. Traders will attempt to free ride on other traders' investments in the CESL: they will wait for other traders experiment with its provisions and risk deleterious outcomes in court. As a result, few traders would ever adopt the CESL. It is laudable that Articles 58 through 69 offer many of the same interpretive tools as other international contract law regimes. But that does not prevent member states' courts from unilaterally co-opting their own jurisprudence, misinterpreting other case law from the Article 14 database, or ignoring other member states' CESL precedent. Depending on the member state, a court may be more likely to succumb to pressure from other government branches and favor its nation's own businesses and consumers at the expense of legal uniformity.

VI. CONCLUSION

The CESL violates the subsidiarity principle, and therefore would be an illegal usurpation of authority by the EU, as long as it remains an optional instrument. Traders are unlikely to voluntarily operate under a legal regime that has no precedent, has highly restrictive provisions and consumer protections, and is not comprehensive even with respect to a single trader's cross-border sales contracts (let alone all cross-border transactions generally). Alternatively, the Commission could have introduced a mandatory regime if it wanted to guarantee greater consistency with the subsidiarity principle. By denying traders the choice between the CESL and the current member states' regimes, a mandatory regime would impose first-mover costs on every trader wishing to enter the cross-border market. While this does not entirely eliminate the problem of traders waiting on the sidelines until others take the risks of the precedent-less CESL, a mandatory regime would at least force those remaining traders who foresaw a positive expected value from cross-border transactions to operate under its provisions. A mandatory regime would therefore develop the legal precedents and increase traders' and consumers' familiarity with it more quickly than an optional instrument. As the precedent developed, the cost of

¹³² *Id.* at *9.

¹³³ Also, regardless of the legal regime, language barriers increase the costs of cross-border trade. An EU-wide regime can't eliminate these costs, though Article 61 does attempt to mitigate them by requiring that courts base their interpretation on the language in which the contract was first drawn up, if there two or more language versions of the contract. CESL, Art 61 (cited in note 1).

entry for other traders would decline over time, thereby moving the EU closer toward a consolidated internal market and fulfilling the economic and political requirements for subsidiarity.

This raises the question of why the CESL is not a mandatory regime. The Commission published a green paper in January 2010 that presented seven different possibilities for the legal nature of a European contract law.¹³⁴ Three of the options were the opt-in system, a mandatory contract law, and a mandatory European Civil Code encompassing a broader set of legal obligations.¹³⁵ However, it most likely did not select a mandatory regime for reasons of political expediency. The member states would never have consented to having huge swathes of their jurisprudence replaced by an institution that has a well-established reputation for being too removed from their voting populations.¹³⁶

The political implausibility of a mandatory regime—along with the strong support for the CESL among member states—mirrors the subsidiarity principle's greatest weakness: it is a legal doctrine that operates as a vehicle for member states' policy-based political objections. Because subsidiarity is primarily addressed in extralegal discourse between the EU and the member states, it receives comparatively little attention in EU jurisprudence. Therefore, it remains vulnerable to political distortions as the member states and Brussels struggle to negotiate the boundaries of federal and local power. Any proposal to strengthen the internal market is invariably subjected to a policy debate that will also create ambiguous norms that remain difficult to interpret or legislate around.

Nevertheless, as the debate surrounding the CESL indicates, political distortions are pervasive, but likely still necessary, for the subsidiarity principle to serve any purpose. Subsidiarity facilitates discourse between different levels of government about the proper distribution of regulatory powers between themselves precisely because it provides doctrinal language for member-state-level coalitions to express their underlying grievances. Accordingly, the subsidiarity principle is a particularly important lens through which to assess government structures in the twenty-first century. The nineteenth century conception of the nation state does not effectively translate to the pressures that the modern globalized economic landscape imposes on all levels of governance.

¹³⁴ *Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, COM(2010) 348 (cited in note 83).

¹³⁵ *Id.* at 9, 11.

¹³⁶ The Commission also argued that a mandatory regime might not satisfy the proportionality principle—a sister doctrine to subsidiarity—which states that the EU may not take any action that would “exceed what is necessary to achieve the objectives of the Treaties” regardless of the intent of the objectives. TEU, Art 5(4) (cited in note 10). For a discussion of the proportionality principle, see Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 *Eur L J* 2 (2010).

Federal governments can no longer assume that they can completely define the scope of decentralization at any point in time.¹³⁷ And depending on electoral results and regime changes at any level of government, the probability increases that the line dividing centralized and local authorities' competencies will shift.¹³⁸ This is certainly true for the EU, where the cascades of financial crises in several member states have spurred Europeans to reconsider the obligations that the member states and the EU have to each other. In light of the EU's current financial and regulatory issues, the subsidiarity principle holds great promise going forward for framing future EU debates over centralization and member state sovereignty.

¹³⁷ Roger D. Congleton, *Asymmetric Federalism and the Political Economy of Decentralization*, in Ehtisham Ahmad and Giorgio Brosio, eds, *Handbook of Fiscal Federalism* 131, 132 (Edward Elgar 2006).

¹³⁸ See Heather L. Tafel, *Regime Change the Federal Gamble: Negotiating Federal Institutions in Brazil, Russia, South Africa, and Spain*, 41 *Publius* 257 (2011) (offering a theoretical framework for negotiated federal outcomes in countries that experience regime changes); Jason Sorens, *The Institutions of Fiscal Federalism*, 41 *Publius* 207 (2011) (supporting the institutionalist view of fiscal federalism, which states that sub-central governments' fiscal powers are meaningful and self-enforcing only if the central government cannot undermine regional authority).